

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF EDUCATION

In the Matter of Proposed Adoption of
Rules of the State Board of Education
Relating to Code of Ethics, Minn. Rule
Part 3512.5200.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on November 17, 1998 in the auditorium of the Capitol View Conference Center, Roseville, Minnesota. The hearing continued until all interested persons had been heard.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Board of Education (the Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Board after initial publication are substantially different.

Bernard Johnson, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Board at the hearing. The Board's hearing panel consisted of Donald Krukow, Jr., Team Leader of the Board; Jeanne Kling, President of the Board; Marsha Gronseth, Executive Director of the Board; Garnet Franklin of Education Minnesota, and Michael Tillmann, Acting Executive Director of the Minnesota Board of Teaching.

Approximately thirty-five persons attended the November 17 hearing. Fifteen persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to December 7, 1998. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on December 14, 1998, the rulemaking record closed for all purposes. The Administrative Law Judge received twenty-two written comments from interested persons during the comment period. The Board submitted written comments

responding to matters discussed at the hearings. The Board did not propose any modifications to the rules.

Notice

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. During that time, this Report must be made available to interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, the Board must submit the proposed rule to the Legislative Coordinating Commission for the Commission's advice and comment.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then the Board shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, the Board shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 4, 1997, the Board requested the assignment of an Administrative Law Judge for the proposed rulemaking and filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) a Dual Notice of Hearing under Minn. Stat. § 14.22, subd. 2 and a Notice of Hearing under Minn. Stat. § 14.22, subd. 1, proposed to be issued; and
- (c) a draft of the Statement of Need and Reasonableness (SONAR).

2. The SONAR was hand-delivered to the Legislative Reference Librarian on September 17, 1998. On September 28, 1998, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. The Board also mailed notice on the same date to the persons and organizations that the Board believed would be interested in the proposed rules. The recipients included school officials, public libraries, public school principals and superintendents, statewide educational organizations, community education directors, heads of institutions that prepare school administrators, and Minnesota legislators. The Board posted the Notice of Hearing and proposed rules on the internet at <http://children.state.mn.us>.

3. On October 5, 1998, the Notice of Hearing and the proposed rules were published at 23 *State Register* 705.

4. At the hearing in this matter, the Board filed the following documents^[1] with the Administrative Law Judge:

- 1. Resolution Authorizing Notice of Solicitation of Outside Information;
- 2. Certificate of Resolution Authorizing Notice of Solicitation of Outside Information or Opinions;
- 3. Notice of Intent to Solicit Outside Information;
- 4. Notice of Intent to Solicit Outside Information as published at 22 *State Register* 293, August 18, 1997;
- 5. certificate that the list of persons, associations, and other interested groups who have requested to receive notice of

the proposed adoption of rules by the Board is accurate and complete;

6. affidavit of mailing the Request for Comments to all persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Board;
7. affidavit of additional mailing of the Request for Comments to all statewide educational organizations;
8. affidavit of mailing the Request for Comments to all superintendents of public schools in Minnesota;
9. affidavit of mailing the Request for Comments to all principals of public schools in Minnesota;
10. affidavit of mailing the Request for Comments to all community education directors in Minnesota;
11. affidavit of mailing the Request for Comments to all public libraries in Minnesota;
12. affidavit of mailing the Request for Comments to all deans and chairpersons of colleges and universities that prepare educators in Minnesota;
13. affidavit of mailing the Request for Comments to all special education directors in Minnesota;
14. affidavit of mailing the Request for Comments to all Minnesota State Legislators in the Senate Education and the House Education committees;
15. the final report of the Working Group convened to develop and recommend a code of ethics for supervisory personnel;
16. the proposed rules Relating to Code of Ethics for School Administrators, with the approval of the Revisor of Statutes;
17. the Statement of Need and Reasonableness (SONAR);
18. the certificate of transmittal of SONAR to the Legislative Reference Library;
19. the proposed Authorizing Resolution of the Board to propose the rule establishing a Code of Ethics for

Minnesota School Administrators;

20. the Authorizing Resolution of the Board to propose the rule establishing a Code of Ethics for Minnesota School Administrators;
21. Notice of Intent to Adopt Rules Without a Public Hearing, and Notice of Hearing if 25 or more Requests for Hearing are Received as mailed;
22. Notice of Intent to Adopt Rules Without a Public Hearing, and Notice of Hearing if 25 or more Requests for Hearing are Received as published in 23 *State Register* 705, on October 5, 1998;
23. certificate that the list of persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Board is accurate and complete;
24. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Board;
25. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all Minnesota Statewide Educational Organizations;
26. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all superintendents of Minnesota Public School Districts;
27. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all principals of Minnesota Public Schools;
28. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all Minnesota Directors of Community Education;
29. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all Minnesota Public Libraries;
30. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all deans and chairpersons of colleges and universities that prepare educators in Minnesota;
31. affidavit of mailing the Dual Notice of Intent to Adopt Rules to all Minnesota Directors of Special Education;
32. affidavit of mailing the Dual Notice of Intent to Adopt Rules

- to Minnesota State Legislators in the Senate Education and the House Education committees;
33. the comments received in response to the Dual Notice;
 34. the Notice of Hearing sent to those persons requesting a hearing;
 35. the certificate of mailing the Notice of Hearing to those persons who requested a hearing;
 36. the list of witnesses the Board intends to call at the hearing;
 37. testimony of Marsha Gronseth, Executive Director of the Board; and
 39. testimony of Michael Tillmann, Acting Executive Director of the Minnesota Board of Teaching.

Ethics Rules Development Process.

5. In September, 1997, the Board formed the Working Group to develop recommendations concerning and the language of a code of ethics for school supervisory personnel.^[2] Nine professional organizations (whose members are school superintendents, principals, teachers, community educators, special education administrators, and school boards) participated in the Working Group.^[3] The Working Group met four times and prepared a report recommending the adoption of a code of ethics including thirteen standards of conduct and an enforcement mechanism in accord with Minn. Stat. § 214.10, subds. 1-3.^[4] The Working Group recommended that the penalties for ethics violations be administered in a fashion consistent with Minn. R. 8700.7500, subp. 4 (the Board of Teaching ethics rule). Specifically, the Working Group suggested remediation, settlement, censure, probation, suspension, and revocation as penalties that should be available to the Board. A recommendation for including school administrators in the process of evaluating complaints was also made.^[5]

Nature of the Proposed Rules and Statutory Authority.

6. School administrators are licensed by the Board to perform supervisory responsibilities. There are specific standards for license revocation set out in Minn. Stat. § 125.09, subd. 1 (renumbered as 122A.20, subd. 1). School administrators have separate licenses from teachers, although many school administrators hold teaching licenses as well as licenses in school administration. The Board indicates that its statutory authority to adopt these rules comes from Minn. Stat. § 125.05, subd. 1c (renumbered as 122A.18, subd. 3) which reads as follows:

Subd. 3. **Supervisory and coach qualifications; code of ethics.** The state board of education must issue licenses under its jurisdiction to persons the state board finds to be qualified and competent for their respective positions under the rules it adopts. The state board of education may develop, by rule, a code of ethics for supervisory personnel covering standards of professional practices, including areas of ethical conduct and professional performance and methods of enforcement.

7. As proposed by the Board, violations of the ethics rules by a licensed school administrator would constitute grounds for license discipline, including revocation or suspension of that license. Douglas Skor, Counsel for the Minnesota Association of School Administrators (MASA) objected to the Board's proposed use of the ethics rules as grounds for suspension or revocation of license.^[6] Dale Swanson, Counsel for the Minnesota Elementary School Principals' Association (MESPA) maintains that the only grounds for license discipline are found in Minn. Stat. § 125.09, subd. 1 (renumbered as 122A.20, subd. 1).^[7] MASA and MESPA maintain that the Board lacks the statutory authority to adopt a code of ethics that would be enforced through the revocation and suspension process.

8. The revocation and suspension statute governing both teaching and school administrator licenses states:

122A.20 Suspension or revocation of licenses.

Subdivision 1. **Grounds for revocation, suspension, or denial.** The board of teaching or the state board of education, whichever has jurisdiction over a teacher's licensure, may, on the written complaint of the school board employing a teacher, a teacher organization, or any other interested person, refuse to issue, refuse to renew, suspend, or revoke a teacher's license to teach for any of the following causes:

- (1) Immoral character or conduct;
- (2) Failure, without justifiable cause, to teach for the term of the teacher's contract;
- (3) Gross inefficiency or willful neglect of duty; or
- (4) Failure to meet licensure requirements; or
- (5) Fraud or misrepresentation in obtaining a license.

The written complaint must specify the nature and character of the charges. For purposes of this subdivision, the board of teaching is delegated the authority to suspend or revoke coaching licenses under the jurisdiction of the state board of education.

9. The Board of Teaching has adopted an ethics code for teachers under statutory language that is nearly identical to the statutory authorization for the Board of Education. The teacher's code of ethics states:

Standards of professional conduct. The standards of professional conduct are as follows:

- A. A teacher shall provide professional education services in a nondiscriminatory manner.
- B. A teacher shall make reasonable effort to protect the student from conditions harmful to health and safety.
- C. In accordance with state and federal laws, a teacher shall disclose confidential information about individuals only when a compelling professional purpose is served or when required by law.
- D. A teacher shall take reasonable disciplinary action in exercising the authority to provide an atmosphere conducive to learning.
- E. A teacher shall not use professional relationships with students, parents, and colleagues to private advantage.
- F. A teacher shall delegate authority for teaching responsibilities only to licensed personnel.
- G. A teacher shall not deliberately suppress or distort subject matter.
- H. A teacher shall not knowingly falsify or misrepresent records or facts relating to that teacher's own qualifications or to other teachers' qualifications.
- I. A teacher shall not knowingly make false or malicious statements about students or colleagues.
- J. A teacher shall accept a contract for a teaching position that requires licensing only if properly or provisionally licensed for that position.^[8]

10. Violations of the ethics code by teachers are investigated and sanctions are imposed for such violations under the revocation and suspension provision of Minn. Stat. § 122A.20. This enforcement mechanism has been in place for 20 years without being disturbed by the legislature. This suggests that the legislature intended a parallel system for administrators who are also licensed under § 122A.20. The statutory grant of authority to the Board for adoption of a code of ethics explicitly included “methods of enforcement.”^[9] As MESPA points out, legislative intent would be clearer if violation of the ethical standards was added to Minn. Stat. § 122A.20. However, in light of the parallel enforcement scheme for teachers, there is no reason to believe that a more restrictive means of enforcement was intended by the legislature for administrators. The range of enforcement methods proposed by the Board allows great flexibility. Revocation will not, of course, be the result of every violation. Any abuse by the Board, such as a license revocation for a mild offense, is subject to judicial correction. Although MASA maintains that the intent to provide for possible suspension or revocation of a license was disclosed late in the process, it appears to be a part of the rules as first proposed at Minn. Rule 3512.5200, subps. 5 D and E. The Board has been granted the authority to determine what ethical standards each licensee must adhere to in order to retain licensure.

11. MESPA maintains that the grant of authority to adopt an ethics code constitutes an improper delegation of legislative authority.^[10] MESPA asserts that no clear standard exists as to what is to be adopted for ethical standards. However, an invalidation of the statute on constitutional grounds is outside the authority of the

administrative law judge or the Board.^[11] MESPA also complains about the lack of school administrator involvement in the application of the rules toward individual licensees. The nature of ethical standards arises from the accepted norms of behavior by the members of a profession. The legislative grant of authority to adopt these rules anticipated the participation of licensees in the development of what standards should be imposed on licensees. Through the Working Group, the Board received that input. The statute authorizing the rules makes no specific provision for the peer review proposal suggested as an alternative to Board enforcement of the rule. The Board argues that it lacks authority to create another decision-making body when the statute assigns the responsibility for enforcement to the Board. Whether or not there is statutory authority for such a provision, the choice of the method of enforcement is within the policymaking discretion of the Board as long as its choice is shown to be reasonable. The Board does propose to utilize the administrative member of the Board of Teaching as a consultant on ethics matters. The lack of a peer review panel in the rule does not constitute a defect. There is strong support in the record for peer involvement in review of ethical complaints.^[12] The Board may wish to consider some provision for this either in the rule or by a statutory amendment.

12. The proposed rules establish a code of ethics and the methods for pursuing allegations of violations by licensees. The Board is authorized to adopt rules for a code of ethics governing school administrators under Minn. Stat. § 122A.18, subd. 3. The Administrative Law Judge concludes that the Board has general statutory authority to adopt these rules.

Assessment of Impact and Cost of the Rules.

13. Minn. Stat. § 14.131 makes certain requirements of an agency proposing a rule for adoption. The statute states:

Before the agency orders the publication of a rulemaking notice required by section 14.14, subdivision 1a, the agency must prepare, review, and make available for public review a statement of the need for and reasonableness of the rule. The statement of need and reasonableness must be prepared under rules adopted by the chief administrative law judge and must include the following to the extent the agency, through reasonable effort, can ascertain this information:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule; and

(6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

14. The Board identified the classes of persons likely to be affected the proposed rules, a probable increase in costs to the Board, no such increase to other state agencies, and no less costly or less intrusive methods of administering a code of ethics.^[13] There are no applicable federal laws on this issue. The Board concluded that there are no any alternative methods for achieving the purpose of the rules, since the statutory standards for licensure do not "comprehensively identify the professional standards of conduct to which all school administrators need to be accountable."^[14]

15. There was no discussion in the SONAR of the Working Group's proposal that school administrators be included in the evaluation process for complaints. This does not constitute noncompliance with the statutory mandate to consider alternatives, since the Working Group's suggestion was made as a part of the anticipated enforcement method, not as an alternative to that method. The Board has met the requirements of Minn. Stat. § 14.131.

Analysis of the Proposed Rule

16. The Administrative Law Judge must determine, *inter alia*, whether the need for and reasonableness of the proposed rule has been established by the Board by an affirmative presentation of facts. The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of each of the proposed rules. At the hearing, the Board supplemented the SONAR in making its affirmative oral presentation of need and reasonableness for each provision. The Board also submitted written post-hearing comments.

17. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. **Broen Memorial Home v. Minnesota Department of Human Services**, 364 N.W.2d 436, 440 (Minn. App. 1985); **Blocher Outdoor Advertising Company v. Minnesota Department of Transportation**, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." **Manufactured Housing Institute v. Pettersen**, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the

Administrative Law Judge to determine which alternative presents the "best" approach. However, the agency is obligated to consider the approaches suggested.

18. This Report is generally limited to the discussion of the portions of the proposed rule that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission (including every comment submitted before the hearing) has been read and considered. Moreover, because some sections of the proposed rule were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rule is unnecessary. The Administrative Law Judge specifically finds that the Board has demonstrated the need for and reasonableness of the provisions of the rule that are not discussed in this Report, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

19. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3. The standards to determine if the new language is substantially different are found in Minn. Rule 1400.1100. The Board did not suggest any modifications, but did acknowledge that it had no objections to several changes suggested in the public comments. Any language which differs from the rule as published in the State Register will be assessed to determine whether the language is substantially different.

Impact on Agricultural Land.

20. Minn. Stat. § 14.111, imposes an additional notice requirement when rules are proposed that affect farming operations. The Administrative Law Judge finds that the proposed rule change will not impact farming operations in Minnesota, and finds that no additional notice is required.

Standards of Professional Conduct

21. Proposed rule **3512.5200, subp. 2**, contains thirteen items, each of which is a separate ethical standard for school administrators. Each item that generated significant comment will be discussed individually.

22. **Item A** requires school administrators to provide professional educational services in a nondiscriminatory manner. The Board used the language identical to that required of teachers for providing professional educational services. Dr. Bruce L. Montplaisir, Superintendent of Independent School District 545, objected to the standard as potentially making the school administrator "instantly" accountable for the actions of teachers. There is no indication that the rule is intended to make the school administrator accountable for all actions by teachers in a building or district. The school administrator could be held accountable under item A for not taking action to resolve complaints against a teacher. This is both needed and reasonable to conform the

actions of school administrators to generally accepted outcomes in education. MASA and MESPA did not object to the rule. Item A is need and reasonable as proposed.

23. **Item B** requires school administrators to “protect students and staff from conditions harmful to health and safety.” James R. Walker, Superintendent of School District 138, listed, *inter alia*, unsafe buildings, aging school buses, student and staff allergies, and aggressive students as potential sources of harm “that may not be in the control of the administration.” Les Sonnabend, Superintendent of the Prior Lake-Savage School District, indicated that many of the issues arising from this item relate to the allocation of scarce resources. George A. P. Johnson, Principal of Pine City Junior-Senior High School, pointed out that a school administrator cannot guarantee student safety.^[15] Kevin Mackin, Principal of White Bear Lake Area High School, objected to this provision as holding principals “accountable for standards they can only indirectly impact.”^[16] Roger Aronson, Counsel for the Minnesota Association of Secondary School Principals (MASSP) suggested making “reasonable efforts” the appropriate standard and deleting the reference to staff. MASSP suggested that staff complaints should be handled through the grievance process present in teacher contracts.

24. The Board responded that the proposed language was arrived at through suggestions made in the drafting process.^[17] The Board indicated that it had no objection to adding language that would incorporate a “reasonable effort” standard. The objections by the commentators are well taken. The Board maintains that “a code of ethics for school administrators is needed to specify the expectations of professional standards of conduct for school administrators.”^[18] A rule imposing a sanction on conduct outside the control of the licensee is not reasonable. It does not rationally relate to the objective sought to be achieved.^[19] This lack of connection between the standard and the authority of an administrator is a defect in the proposed rule.

25. To cure the defect in the proposed rule, the ethical standard must be related to the school administrator’s own conduct. One way to accomplish this result is to conform the standard for school administrators to the equivalent standard for teachers. Principal Johnson suggested the following language:

A school administrator shall take reasonable action to protect students and staff from conditions harmful to health and safety.^[20]

26. The suggested language restores a connection between the school administrator’s conduct and the desired outcomes for students. Because of the school administrator’s additional responsibility toward staff at schools, the Board’s inclusion of “staff” as a protected group is appropriate. The existence of a grievance process is not a substitute for incorporating that responsibility into the code of ethics. The suggested language reasonably relates the school administrator’s conduct to outcome sought by ethical conduct. The new language conforms to adopted Board of Teaching ethical rules and is not substantially different from the proposed rule as published.

27. **Item C** requires that “A school administrator shall provide an atmosphere conducive to learning.” Principal Johnson indicated that school administrators cannot

guarantee such an atmosphere.^[21] Principal Mackin made a similar comment.^[22] Superintendent Sonnabend indicated that political opponents could use the ethics code as a weapon against particular decisions in a school district. In place of the proposed language, Principal Johnson suggested:

A school administrator shall take reasonable action to provide an atmosphere conducive to learning.

28. As another alternative, MASSP proposed language that would require school administrators to take “reasonable disciplinary action in exercising the authority to provide an atmosphere conducive to learning.”^[23] The Board indicated that it had no objection to the proposed language.

29. The Board’s proposed language for item C suffers from the same defect as item B. The language suggested by Principal Johnson cures the defect to the rule language. The language proposed by MASSP is more restrictive in its scope than the other suggested language, but would also cure the defect in item C. Neither proposal is substantially different from the rules as proposed.

30. **Item D** requires that school administrators “not misuse professional relationships with students, parents and caregivers, staff, or colleagues.” MASSP criticized the rule language as too vague and suggested limiting the scope of the prohibited conduct to that which gains a “private advantage.”^[24] Superintendent Montplaisir generally agreed with the proposed rule, but added the he didn’t “want to be hauled into court” due to where he buys his tires.^[25] The Board indicated that the “to private advantage” language had been removed in the editing process. The Board indicated that it had no objection to reinstating that language. The rule as proposed is vague in that it does not allow a reasonable person to know what is prohibited by it.^[26] The unanswered question is “how is a professional relationship misused?” The defect is corrected by adding “to private advantage” to the end of the rule. The rule thus conforms to the teachers’ code and make it clear that an administrator cannot secure private gain due to his or her position.

31. The treatment of confidential information is the subject of **item E**. Dr. Carl L. Midjaas, Director of Human Resources for School District 622, suggested that the approach of the item be reversed, to require that a school administrator not disclose information except when required.^[27] In the ordinary course of their responsibilities, school administrators acquire confidential information. They need the ability to use that information for legitimate purposes. This need is akin to the need of teachers to use that same sort of information for instructing students and administering their classes. MESPA suggested that the rule violates both the Minnesota Government Data Practices Act (MGDPA)^[28] and the Family Educational Rights and Privacy Act (FERPA).^[29] There is nothing obviously violative of the MGDPA in the approach taken by item E. Government data that is categorized as not public is not being released outside the school or district by the rule. Under FERPA, the general rule is that data is not to be released without consent. The first listed exception to that rule indicates that among those who do not need such consent are:

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have **legitimate educational interests**;^[30]

(Emphasis added)

32. There is no conflict between the proposed item E and any cited state or federal statute. Rather the rule requires compliance with state and federal laws. The language of the item parallels that of the teacher's code of ethics. The identification of "legitimate education interests" under FERPA is closely akin to the "compelling professional purpose" in item E. The Board has demonstrated item E is needed and reasonable, as proposed.

33. Under **item G**, school administrators are prohibited from knowingly making false or malicious statements about "students, students' families, staff or colleagues." The teacher's code of ethics is identical, except that it limits the persons about whom the prohibited statements are made to students or colleagues. MASSP suggested limiting the standard to comments made "in the exercise of professional duties."^[31] The scope of school administrators' responsibilities makes expanding the classes of persons covered by the standard to include staff both needed and reasonable.^[32] The limitation proposed by MASSP was not supported by any facts to show that making "false or malicious statements" about students, students' families, staff or colleagues would not have an impact on working relationships, so long as those statements are not made "in the exercise of professional duties." Such conduct may disrupt the educational process and is properly included in a code of ethics. Item G is needed and reasonable, as proposed.

34. **Item H** prohibits accepting "gratuities, gifts, or favors that impair professional judgment," and prohibits offering anything of value "to obtain special advantage." Superintendent Montplaisir indicated that the standard "seems innocent enough," but expressed concern that even minimal expressions (such as a cup of coffee) would be sufficient to trigger an inquiry.^[33] Robert Bangtson, Principal of Goodhue Elementary School, catalogued a number of items routinely received or given in the ordinary course of a school year.^[34] Principal Bangtson suggested setting a dollar value on gifts or favors that are unacceptable.^[35] MASSP suggested using the similar language from the teacher's code of ethics (which prohibits using "professional relationships" to "private" advantage). The rule does not prohibit all gifts, but only those that impair professional judgment. The requirement that the Board prove impairment of professional judgment in receiving gifts and obtaining special advantage when giving gifts is a sufficiently limiting factor to provide flexibility and to remove vagueness. The item is needed and reasonable as proposed.

35. **Item J** requires that a school administrator "assign only appropriately licensed personnel, or persons for whom the school district has been granted a variance" in positions requiring a license. The Board indicates that the teaching license requirement is imposed by Minn. Stat. § 123.35, subd. 5, and Minn. R. 8700.7500,

subp. 2(j).^[36] The Working Group suggested this standard.^[37] The Working Group also stated:

The Working Group recommends that before the Code of Ethics becomes Board of Education Rule, a concerted effort of the state licensing office in the Department of Children, Families and Learning and school district hiring authorities occurs to inform and apply the most expedient procedures for seeking licensure and state authorization to assist administrators confronted with emergency hirings. Emergency conditions include situations caused by the variances of supply and demand of licensed staff and the filling of partial assignments.^[38]

36. MASSP indicated that the rule ignores the need to fill emergency openings. Dr. Don E. Lifo, Superintendent of Northeast Metro 916 Intermediate School District, indicated that in filling teaching vacancies, superintendents often have little or no notice.^[39] Superintendent Lifo provided his firsthand experience that filling such vacancies must be done immediately to avoid classroom disruption. For partial positions, Superintendent Lifo indicated that some of these positions can be .15 (about 1/7) of a full time position.^[40] The commentator expressed his opinion "that students are better served when a licensed teacher already on staff voluntarily agrees to pick up the other section, even though s/he may not have that specific subject license."^[41] Superintendent Montplaisir indicated that remote school districts often have difficulty in hiring licensed personnel.^[42]

37. The Board maintains that waivers are available and should be obtained by teachers to ensure administrators meet the same standard required of teachers. Superintendent Lifo addressed the Board's position as follows:

I am aware that the Department of Children, Families, and Learning has emphasized that a process exists for waivers, and that superintendents and principals needs (*sic*) to be held accountable to use that process. The concern expressed by the Advisory Committee, however, was that the current procedures and staffing might not be sufficient to handle the volume of requests once the new rule is in place. Additionally, in order to provide staffing for our students, superintendents and principals are often in a position where they have to make a decision immediately pending later review by the Department. Based upon my experience, both of the examples described in this letter could be counted in the hundreds, if not thousands in any given school year. It is understandable that superintendents do not want to create a conflict between meeting the needs of students and abiding by their code of ethics.^[43]

38. The Board relies upon the teacher code of ethics and licensure standards to support imposing discipline on administrators for assigning teachers who are not currently licensed in an area to teach a class in that area. The Board indicates that the Board of Teaching has twenty-seven cases of teachers "teaching without licensure or

outside of their license area."^[44] Over the last six years, sanctions have been imposed in eight instances for violation of the teacher's code of ethics.^[45]

39. The record in this matter demonstrates that the limitations on teachers are not rigidly applied. There is evidence of a current educational practice of assigning licensed teachers without specific licensure in an educational area in urgent situations. The imposition of less than two ethics sanctions per year is an indication that this practice is not a significant problem. The Board's citation of twenty-seven cases involving improperly licensed teachers does not distinguish between teachers with no license and teachers with a license who are teaching outside their area of licensure. Item J is unreasonable because the proposed rule does not recognize emergencies that preclude administrators from assigning only appropriately licensed teachers to classes. The Board has not demonstrated in the record the facts which might justify sanctions for any use of personnel who are not appropriately licensed. See Finding of Fact No. 17. Rather the record supports the conclusion that there are valid reasons for use of these personnel in exceptional circumstances when it can be plainly justified.^[46] The Board's waiver panel meets only monthly and the record indicates that Department staff has not always been adequate to handle waiver requests or letters of approval in a timely manner. The Administrative Law Judge suggests the following language, or something similar, to cure the defect:

J. A school administrator, in filling positions requiring licensure, shall employ, recommend for employment, and assign only appropriately licensed personnel, or persons for whom the school district has applied for or been granted a variance by the appropriate state board or agency, unless, after making reasonable efforts to obtain a variance, an appropriately licensed person cannot be assigned and the position must be filled to meet a legitimate emergency educational need.

40. The suggested language attempts to accommodate the needs of administrators to assign personnel at short notice and pending approval of a waiver application. The final clause of the item is intended to address the issue of emergency appointments where the need of a school district, individual school, or students can be demonstrated to support the assignment of a staff member lacking the appropriate licensure. The suggested language supports the license standard and waiver process. Any administrator seeking to rely on this language must demonstrate that reasonable efforts were made to obtain a waiver. The administrator must also articulate an emergency reason why this class must be taught by a staff person with inappropriate licensure. The new language meets the needs of administrators in assigning staff. The new language is needed and reasonable. The suggested language addresses concerns that were made by the Working Group and several commentators and does not constitute a substantial change.

41. **Item K** requires that an administrator "shall comply with all state and federal laws, State Board of Education policies, and school district policies." MASSP characterized this rule as "aspirational." Every time a special education student successfully obtains different educational services by suit, noncompliance with federal

law has occurred. This fact has no bearing on the good faith decision-making of the administrator who made the initial decision on services. MESPA pointed out that some school district policies are illegal (citing a policy discriminating on the basis of pregnancy).^[47] In such an instance, an administrator following the law violates the policy and is subject to discipline. The Board has not shown the rule to be either needed or reasonable. The rule also inappropriately elevates Board and school district policies to the status of law by making their violation subject to license discipline. The other standards proposed are sufficient to ensure that administrators will use their best efforts to comply with applicable laws and policies. Deleting this item does not constitute a substantial change.

42. MASSP criticized **item L** as unworkable. Item L requires administrators to "manage, authorize the use of, and account for public funds and property for the purposes for which they are legally intended." Superintendent Montplaisir indicated that disputes over funding occur and are sometimes settled by providing funding inconsistent with the original intent of the funding.^[48] Additionally, teacher salaries may be paid from a staff development account. The Board provided no indication as to what conduct was intended to be curbed by the item. The language of item L is unduly vague, leaving the impact of the rule entirely dependent upon how the rule is enforced. The Board has not provided sufficient clarity in the rule to advise administrators as to what conduct is considered unethical under the rule.^[49] Item L is defective and cannot be adopted. Deleting the item is not a substantial change.

Enforcement

43. **Subpart 3** specifies that complaints will be enforced using the approach set out in Minn. Stat. § 214.10, subds. 1, 2 and 3. As discussed above, several commentators and the Working Group urged that the Board use administrators to conduct peer review of complaints. The Board has chosen to follow the approach of the Board of Teaching in investigating and resolving complaints.^[50] This approach has been demonstrated to be both needed and reasonable. Use of peer review in some fashion may be within the discretion of the Board and such an approach can be incorporated into the Board's ongoing review of the code of ethics as applied to administrators or a legislative authorization can be sought.

Complaints

44. The process for the Board's handling of complaints is set out in **subpart 4**. The subpart requires a written complaint and notice to the administrator. The subpart expressly states that the administrator is entitled to representation at each stage of the proceeding. This language addresses an issue raised by Superintendent Montplaisir, where a complaint had been lodged and the administrator was expected to answer the complaint without knowing its contents.^[51] Subpart 4 ensures that administrators receive notice of complaints. The subpart is needed and reasonable.

Available Penalties

45. **Subpart 5** sets out the penalties available for imposition upon administrators found to have violated the ethics code. The subpart follows the suggestions of the Working Group to provide an opportunity for remediation, then settlement, censure, probation, suspension, and revocation as penalties. The subpart is consistent with the purposes of the proposed code of ethics. Subpart 5 is needed and reasonable.

Summary

46. Almost all of the comments from school administrators supported the adoption of a code of ethics to govern the conduct of licensees. In many of these same comments, the school administrators objected to the proposed rule as having nonlicensees making decisions as to what is ethical conduct. There are benefits in having licensees review complaints. Other licensees can bring perspective to the complaint process and reassure licensees that the system is fair. It is up to the Board as to whether any such process will be developed. With the modifications and deletions suggested to cure the defects found in the rules, the code of ethics proposed by the Board is both needed and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Education gave proper notice of this rulemaking hearing.

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding of Fact Nos. 30 and 42.

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings of Fact Nos. 24, 29, 39, and 41.

5. The additions and amendments to the proposed rules suggested after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusions 3 and 4, as noted at Findings of Fact Nos. 25, 29, 30, 39, 41, and 42.

7. Due to Conclusions 3, 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted, except as otherwise noted above.

Dated this 18th day of January, 1999.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

Reported: Taped, No Transcript

^[1] The numbers correspond to the numbering of the documents.

^[2] Exhibit 15.

^[3] Exhibit 15, at 2.

- ^[4] Exhibit 15, at 8-9.
- ^[5] Exhibit 15, at 7.
- ^[6] Ex. 63.
- ^[7] Ex. 62.
- ^[8] Minn. R. 8700.7500, subp. 2.
- ^[9] Minn. Stat. § 122A.18, subd. 3.
- ^[10] Exhibit 62.
- ^[11] *Weeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *In Re Rochester Ambulance Service*, 500 N.W.2d 491 (Minn. Ct. App. 1993).
- ^[12] See e.g. Ex. 41.
- ^[13] Exhibit 17, at 14-15.
- ^[14] Exhibit 17, at 15.
- ^[15] Exhibit 57.
- ^[16] Exhibit 33. *See also*, Ex. 62, p. 5.
- ^[17] The Board indicates it made several changes to the proposed rules based upon the Revisor of Statute's comments that certain phrases were vague or in need of definition. The authority of the Revisor extends to matters of form, rather than legality, however. Minn. Stat. § 14.07.
- ^[18] Exhibit 17, at 3.
- ^[19] *Mammenga v. DHS*, 442 N.W.2d 786, 789-90 (Minn. 1989).
- ^[20] Exhibit 33; similar language proposed by MASSP (Exhibit 38).
- ^[21] Exhibit 57.
- ^[22] Exhibit 33. *See also* Ex. 62, p. 5.
- ^[23] Exhibit 38.
- ^[24] Exhibit 38.
- ^[25] Exhibit 33.
- ^[26] *In Re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) appeal dismissed 106 S. Ct. 375(1985).
- ^[27] Exhibit 33.
- ^[28] Minn. Stat. Ch. 13.
- ^[29] 20 U.S.C. § 1232g.
- ^[30] 20 U.S.C. § 1232g(b)(1)(A) (emphasis added).
- ^[31] Exhibit 38.
- ^[32] Superintendent Montplaisir suggested that this rule provision might protect perpetrators of abuse. Exhibit 33. Minn. Stat. § 626.556, subd. 4(a), holds reporters of abuse immune, so long as the report of abuse is made in good faith.
- ^[33] Exhibit 33.
- ^[34] Exhibit 33.
- ^[35] Exhibit 33.
- ^[36] Exhibit 17, at 10.
- ^[37] Exhibit 15, at 7.
- ^[38] Exhibit 17, at 7.
- ^[39] Exhibit 64.
- ^[40] Exhibit 64.
- ^[41] Exhibit 64.
- ^[42] Exhibit 33.
- ^[43] Exhibit 64. *See also* Ex. 63, p. 5.
- ^[44] Exhibit 61, at 4.
- ^[45] Exhibit 61, at 4.
- ^[46] E.g., Exs. 57, 59.
- ^[47] Exhibit 33.
- ^[48] Exhibit 33.
- ^[49] *See* Finding of Fact No. 30.
- ^[50] Exhibit 37.
- ^[51] Exhibit 33.